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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BRIGHTON COLLECTIBLES, INC.,) Civil No. 10-0419-AJB(WVG)
12)
13 Plaintiff,) ORDER DENYING PLAINTIFF'S
14) APPLICATION TO UTILIZE
15 v.) DEPOSITION AND TRIAL
16) TESTIMONY GIVEN IN OTHER
17) CASES
18)
19 Defendants.)
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18 On October 31, 2011, Plaintiff Brighton Collectibles, Inc.
19 ("Plaintiff") applied to the Court, via letter, to be permitted to
20 utilize certain deposition and trial testimony given by third party
21 witnesses in other cases. On November 16, and 23, 2011, Defendants
22 Joy Max Trading, Inc. and NHW, Inc. ("Defendants") opposed, via
23 letters, Plaintiff's application. On January 5, 2011, the Court held
24 a hearing on Plaintiff's application. The Court, having reviewed
25 Plaintiff's application, Defendants' opposition letters, the
26 authority cited therein, as well as the supplemental authority cited
27 at the hearing, and GOOD CAUSE APPEARING, HEREBY DENIES Plaintiff's
28 application.

I

PRIOR TESTIMONY

Plaintiff seeks to use in this action, testimony given by third party witnesses in previous actions in which it was involved. The testimony and cases in which the testimony was given are as follows:

1. Deposition testimony of Monica Bolin in Brighton Collectibles v. Marc Chantal USA, Case No. 06-1584.

2. Deposition testimony of Richard A. Lewis in Brighton Collectibles v. Marc Chantal USA, Case No. 06-1584.

3. Deposition testimony of Richard A. Lewis in Brighton Collectibles v. Dynasty Designs, Case No. 06-1588.

4. Deposition testimony of Cindy Lombardi in Brighton Collectibles v. Dynasty Designs, Case No. 06-1588.

5. Deposition testimony of Sheila Bell in Brighton Collectibles v. Dynasty Designs, Case No. 06-1588.

6. Deposition testimony of Steven Zamler in Brighton Collectibles v. Dynasty Designs, Case No. 06-1588.

7. Trial Testimony of Amy Delducco in Brighton Collectibles v. Coldwater Creek, Case No. 06-1848.

II

PLAINTIFF'S ARGUMENTS

Plaintiff supports its application by positing the following arguments:

1. The request to utilize the prior testimony is necessary in order to eliminate the undue expense to Plaintiff, of traveling to five states and taking seven depositions that will duplicate what has already been discovered in similar cases. Fullerform

1 Continuous Pipe Corp. v. American Pipe & Constr. Co., 44 F.R.D. 453
2 (D. AZ 1968);

3 2. The evidence falls within the hearsay exception under
4 Federal Rule of Evidence 804(b)(1). The prior defendants, Marc
5 Chantal, Dynasty Designs, and Coldwater Creek, are "predecessors in
6 interest" to the current Defendants, as the current Defendants have
7 similar motives to cross-examine the prior witnesses as the prior
8 defendants that questioned the witnesses. Hynix Semiconductor, Inc.
9 v. Rambus, Inc., 250 F.R.D. 452, 458 (N.D. Cal. 2008);

10 3. The evidence is relevant to establish "secondary meaning"
11 acquired by Plaintiff. Plaintiff notes that prior testimony in prior
12 cases was allowed in subsequent cases, pursuant to the predecessor-
13 in-interest exception to Federal Rule of Evidence 804(b)(1).

14 III

15 DEFENDANTS' ARGUMENTS

16 Defendants oppose Plaintiff's application by arguing:

17 1. The prior testimony is inadmissible hearsay pursuant to
18 Federal Rule of Evidence 801. The testimony may only be admitted
19 when the witness is unavailable; and if the party against whom the
20 testimony is now offered-or, in a civil case, whose "predecessor in
21 interest," had an opportunity and similar motive to develop the
22 testimony by direct, cross-, or redirect examination. Federal Rule
23 of Evidence 804(b)(1).

24 2. The witnesses are available because Plaintiff asserts
25 that its application allows Defendants the opportunity to depose the
26 witnesses should they choose to do so. However, Plaintiffs must show
27 that the witnesses are unavailable, not only for trial, but for
28 deposition as well, in order to avoid taking a new deposition and

admitting prior deposition testimony. In re Master Key Antitrust Litigation, 72 F.R.D. 108 (D. CT 1976).

3. Marc Chantal, Dynasty Designs, and Coldwater Creek are not "predecessors in interest" to any Defendants in this case. Therefore, Defendants have not had the opportunity to cross-examine the witnesses at the time of the prior testimony and have not had the opportunity to develop the testimony. Therefore, the prior testimony should not be admitted in evidence. Plaintiff should incur the costs to depose the witnesses if it desires to use the prior testimony at trial, and allow Defendants the opportunity to properly cross-examine the witnesses.

4. Even though Plaintiff frames its application as an attempt to save costs, granting the application actually shifts the costs and burdens to Defendants to travel to various states to depose the witnesses.

IV

PLAINTIFF FAILS TO SHOW THAT THE WITNESSES ARE UNAVAILABLE;
UTILIZING THE PRIOR TESTIMONY IS NOT COST EFFICIENT;
THE PRIOR DEFENDANTS ARE NOT "PREDECESSORS IN INTEREST" TO
THE CURRENT DEFENDANTS

Federal Rule of Evidence 804 states in pertinent part:

...
(b) the following are not excluded by the rule against hearsay if the declarant is *unavailable* as a witness:

(1) Testimony that:

(B) is now offered against a party who had- or, in a civil case, whose *predecessor in interest* had- an *opportunity* and similar motive to develop it by direct, cross-, or redirect examination. (emphasis added).

A. The Witnesses Are Available For Deposition

Defendants assert, and Plaintiff concedes, that the witnesses from the prior litigations are available for deposition. Defendants rely on In re Master Key, 72 F.R.D. at 110 n.1 (D. CT 1976), in

1 which the court found, that for purposes of admitting the prior
2 deposition of a witness in evidence at trial, it was not enough to
3 prove that the witness was unavailable at trial. Rather, the
4 proponent must also show that the witness is unavailable for
5 deposition. Id. However, in that case, the court issued an earlier
6 order that did not contain one witness' name, thereby, making that
7 witness unavailable for trial. The court required a showing that the
8 witness was also unavailable for deposition before admitting in
9 evidence the prior deposition testimony. Id. at 110.

10 In Affinity Labs of Texas, LLC v. Apple, Inc., 2011 WL
11 2325231 (N.D. Cal. 2011), the court noted that the proponent must
12 first show that the witnesses were unavailable for trial, however
13 that could not have been known until trial had begun. Id., at *1.

14 At this time, the court does not know whether Plaintiff has
15 tried to secure these witnesses for trial in the current litigation.
16 Nevertheless, it is unlikely that they will agree to testify at
17 trial on Plaintiff's behalf due to the fact that they reside in
18 states other than California. However, the witnesses are available
19 for their depositions to be taken. Therefore, the Court finds that
20 Plaintiff has failed to show that the witnesses are unavailable, in
21 accordance with Federal Rule of Evidence 804.

22 B. The Granting of Plaintiff's Application Will Not Result In
23 Economic Efficiency

24 Plaintiff relies on Fullerform Continuous Pipe Corp. v.
25 American Pipe & Constr. Co., 44 F.R.D. 453 (D. AZ 1968), to support
26 its argument that Defendants' opportunity to depose the witnesses
27 allows admission of their prior testimony. Fullerform provided such
28 relief to avoid needless waste of time, money and effort and to
expedite litigation. Id., at 456. Fullerform involved defendants

1 that were accused of being involved in a conspiracy that was first
2 uncovered in a prior litigation. Id., at 455. Some defendants in
3 Fullerform were also parties to the prior litigation, and the
4 overall deposition examination in the prior litigation focused on an
5 industry-wide conspiracy which gave all the defendants a motive and
6 interest to develop the deposition testimony. Id. Therefore, the
7 court's decision to admit the deposition testimony of 26 prior
8 witnesses was to avoid duplicative work. Granting the Fullerform
9 defendants an opportunity to depose the same witnesses to clarify
10 any ambiguities in the prior testimony rested on judicial and
11 economic efficiency. Id., at 456. When a court entertains admission
12 of prior testimony, the underlying objective is efficiency at trial
13 without jeopardizing accurate fact finding. Hub v. Sun Valley Co.,
14 682 F.2d 776, 778 (9th Cir. 1982).

15 Here, Plaintiff's proposal does not actually result in
16 economic efficiency. Plaintiff claims that it should not be required
17 to incur the costs to re-depose the prior witnesses, since it sued
18 the prior defendants for trade dress, copyright and trademark
19 infringement and questioned the witnesses in connection with those
20 claims. Furthermore, Plaintiff contends that the prior defendants
21 had similar motives and interests as the current Defendants to
22 develop the prior witnesses' testimony.

23 However, the court finds that each prior suit was specific to
24 the prior defendants and the products that they designed, manufac-
25 tured and marketed. Unlike Fullerform, Plaintiff does not allege a
26 conspiracy between the prior and current Defendants. Further,
27 Plaintiff asserts that the current Defendants have the opportunity
28 to depose the prior witnesses, but does not identify any particular

1 issues explored in the prior depositions that the Court should
2 consider to be fully developed, in order to efficiently limit the
3 scope of any subsequent depositions. Therefore, Plaintiff's
4 application does not propose a remedy that is efficient in time,
5 money or effort, or expedites litigation, for anyone except itself.
6 As a result, as a matter of efficiency, the Court cannot limit the
7 scope of any future depositions.

8 C. Marc Chantal, Coldwater Creek & Dynasty Designs Are Not
9 "Predecessors in Interest" To The Current Defendants

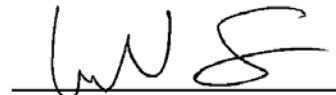
10 A "predecessor in interest" is a party that has had an
11 opportunity and similar motive to develop the testimony by direct,
12 cross-, or redirect examination, in the previous proceeding. United
13 States v. Geiger, 263 F.3d 1034, 1038 (9th Cir. 2001). Instead of a
14 formalistic privity-based test of whether a party is a "predecessor
15 in interest," the test is "inherently factual" and depends on the
16 similarity of issues and context of questioning. Privity is not the
17 gravamen of the analysis. Instead, the party against whom the prior
18 deposition is offered must point to distinctions in its case not
19 evident in the earlier litigation that would preclude similar
20 motives of the witness' examination. In Hub, supra at 778 n.*, the
21 court found "troubling" a rule that accepts, as a substitute for the
22 present opponent's examination, a prior adversary's examination in
23 a prior proceeding when the adversary had an interest to induce a
24 thorough testing by examination. The court stated such an approach
25 fails to take into account that the adversary in the prior proceed-
26 ing is not the same as the adversary in the current proceeding and
27 the possibility that the prior adversary mishandled the cross-
28 examination. Id.

1 Here, the current Defendants were not parties to the actions
2 against prior defendants Marc Chantal, Dynasty Designs or Coldwater
3 Creek. Therefore, those prior defendants did not question the
4 witnesses about the current Defendants' products, or the design or
5 marketing thereof. As a result, a "predecessor in interest"
6 relationship has not been formed. In the prior cases, Plaintiff sued
7 the prior defendants for selling products that were similar to
8 Plaintiff's products such that they infringed upon its trade dress,
9 trademarks and copyrights. Though Plaintiff's prior claims may be
10 similar and perhaps identical to the current claims, at issue in
11 each prior case was whether the prior defendants' conduct resulted
12 in the harm that Plaintiff claimed. Each party owned, created and
13 distributed their own products. Unlike the cases that Plaintiff
14 cites regarding similar motives and interest to depose prior
15 witnesses, the prior testimony here was as to specific and distinct
16 actions regarding different infringing products. The majority of the
17 prior testimony that Plaintiff seeks to utilize discuss the specific
18 actions of the prior defendants. The prior defendants had no
19 interest in developing the testimony when statements were made
20 regarding the specific actions of the current Defendants. Therefore,
21 the prior defendants are not "predecessors in interest" to the
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23
24 current Defendants because they did not have similar motives and
25 interests in developing the testimony.^{1/} Hub, supra, at 778.

26 ^{1/}The cases cited by Plaintiff at the hearing, Runge v. Stanley Fastening
27 Systems, 2011 WL 6755161 (S.D. IN 2011) and Pesterfield v. Sunbeam Corp., 2005 WL
28 1076293 (E.D. TN 2005), are clearly distinguishable. In those cases, the proponent
wanted to use deposition testimony given in prior cases in which the defendants
in the prior cases were parties. Here, Plaintiffs seeks to utilize prior testimony
in cases in which the current Defendants were not parties.

1 As a result of the foregoing, Plaintiff's application to
2 utilize deposition and trial testimony given in other cases is
3 DENIED. If Plaintiff so chooses, it may depose the witnesses noted
4 in Section I of this Order. At the depositions, Defendants may
5 cross-examine the witnesses with respect to issues raised in this
6 action.

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10 DATED: January 11, 2012

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13 Hon. William V. Gallo
14 U.S. Magistrate Judge
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